

**Where Law Ends and Reality Begins:
Limits of Successful Litigation in Desegregating Schools in the
United States, Czech Republic and Hungary**

By

Daniel Louis Robbins

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Advisor: Professor Andás László Pap

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Introduction

School segregation is but one factor which maintains Roma in their diminished status. Roma must achieve parity with non-Roma in employment, housing, health, and civil rights generally. But education is the most important of these, particularly because it can lead to the others. –Jack Greenberg¹

This thesis starts with the presumption, which will be defended below, that education is very important, especially for the lowest classes in society, and socially excluded groups. If groups are able to obtain high quality education, it is one of the clearest routes towards upward mobility, and social acceptance. Education plays a key role in shaping the opinions and thoughts of students as they prepare to enter the adult society. The school serves as a junction point where students interact and dissect the ideas promoted in society. Therefore, the school serves as a very important tool in either maintaining or combating ethnic and racial inequalities. Access to quality education² is arguable one of the most important tools in reducing poverty and increasing innovative, productive societies. The role played by the school is not only true in Central Europe but education and the school as an institution plays a key role in this in the United States. “School segregation of children from low social status groups (with poor, uneducated, unemployed parents) affects the students indirectly, *as a result of the strong correlation between family background and the child’s expected school achievement*. There is a strong correlation between social status and the expected occurrence of learning problems. This correlation is universal and it is a result of a dominant mechanism of transmitting poverty between generations within the family.”³ Schools serve as a means

¹ Jack Greenberg. “Report On Roma Education Today: From Slavery to Segregation and Beyond,” *Columbia Law Review* 110, no. 4 (May 2010): 999

² For more information on the definition of quality education please see: <http://www.unicef.org/girlseducation/files/QualityEducation.PDF>

³ Gábor Kertesi and Gábor Kézdi. “Segregation in the Primary School System in Hungary: Causes and Consequences.” (English Trans.) *Közgazdasági Szemle*, Vol. 52, No. 4 and 5., 2005. 2

by which society can transfer, in a fairly uniform way, the philosophy and ideals of the state, and society onto the next generation. One cannot say the school does not play an integral role in the development of youth. However, schools do not always promote interethnic cohesion, or inter-class cohesion. Schools and school design play a key role in keeping groups separate and keeping economic and social classes distinct. This can happen in two ways, the first is through the segregation of students into different schools either based blatantly on race, as before desegregation in the United States, or more subtly by the curriculum chosen.

“Following the collapse of state communism, the countries of Central and Eastern Europe have been characterized by both economic crisis and a dramatic rise in overt racism. The impact of both has important implications for the human rights situations of Roma in schools”⁴

In choosing to discuss the cases of the United States, Czech Republic and Hungary, I am drawing parallels between the situation and experience of African-Americans, and Roma groups in Central and Eastern Europe. Both have, and continue to face, discrimination, and multiple barriers and impediments to quality education and social inclusion. The land mark United States Supreme Court case *Brown v. Board of Education*, the European Court of Human Rights Case *D. H. and Others v. Czech Republic* and the *Miskolc Desegregation Case* in the Hungarian Supreme Court represent three bold victories for desegregation and minority education rights. However, the aftermath has been very mixed, falling short of a complete 180-degree turn in discrimination and equality in education reform. Specifically in the Czech and the Hungarian cases, the results on the ground, have not been as stunning as the court victory itself. This thesis will focus on the extent to which strategic litigation is successful, and in which ways it falls short and why.

⁴ Claude Cahn et al. “Roma in the Educational Systems of Central and Eastern Europe.”(1998) European Roma Rights Centre. 1

Our study of the limits of strategic litigation as means to increase civil rights through court action shifts now from the United States and the African American context to Central Europe, where litigation is increasingly being used as a means to force governments to uphold respect for human rights and human dignity. There is an ongoing debate of the merits of comparison between African Americans and the Roma as groups that have been persistently discriminated against and consistently scapegoated. However, even though this paper compares and looks at cases focused on African Americans and Roma, the point of the paper is not to contrast and compare the particular similarities of differences in culture, historical experience and current socio-economic situation. Although there are many differences in these areas, I argue that there is value in comparing the efforts of civil rights organizations to utilize the courts as a means to effect positive social change for the group that they represent. In both the American context and in the Central European one, there are NGOs and civil rights organizations that seek out plaintiffs as representatives of the larger group. In both of these cases, the court case has a dual purpose. The smaller reason is to specifically redress the wrongs committed against the plaintiff. However, the larger reason, and the reason behind these organizations' efforts are to encourage and secure more widespread and far-reaching social change through court acknowledgement of illegal discrimination. These cases are important cases, which are considered landmarks in effort to improve education, and access to education. However, these cases are not only valuable for this study because they are the biggest cases, or the most well known, or because they were barrier breaking. These reasons are all important and valuable, but additionally, these cases and the decisions that the courts generated in each case, stand in stark contrast to present reality of continued discrimination in education. Strategic litigation is valuable, and the work that was done in each of these cases is immensely important. However, the court decisions, on their own have not been successful in entirely changing practices and mitigating discrimination.

Chapter One - Context

Why is Education important, especially for minorities?

The basis for this entire thesis, and for each of the court cases examined, is that quality, robust, and equal education is incredibly important for the development of future generations, and specifically for minorities and individuals living in poverty. Each of the three court cases analyzed in this paper argue that separated and segregated educational facilities, whether it is within the same building, or in separate buildings or systems, is inherently negative, and unequal. But why exactly should such a focus be on educational opportunities? Education is seen as one of the clearest and most direct routes out of poverty. Education is one of the most effective tools to combat poverty and to improve the living standards of a population. According to the UN agency UNESCO, “Education is a fundamental human right and essential for the exercise of all other human rights. It promotes individual freedom and empowerment and yields important development benefits.”⁵ Additionally, the Council of Europe (COE) argues that in the broadest sense, “Education is crucial in the sense of acquiring knowledge as well as in the sense of providing these minority populations with awareness of the existing opportunities for the development of their communities.”⁶ The COE states that “The key to a better future lies in the education of Roma children. The disadvantaged position of Roma in society today cannot be changed unless equal opportunities for education are provided to them. Schools need to work to overcome the distrust the Roma have for government institutions based on their history, and create an inclusive and supportive environment. Increasing literacy and school attendance is key to improving the future for the Roma minority.”⁷

⁵ For more information please see: <http://www.unesco.org/en/right-to-education/>

⁶ Pamphlet on the Council of Europe’s involvement in Roma education
http://www.coe.int/t/dg4/education/roma/Source/leaflet_EN.pdf

⁷ *ibid*

However, there is not only a moral, but also an economic impetus to improving education and access to education. Quality education is the basis of the economy. Educated people are needed in order to spur economic growth and development. It is widely noted that throughout Europe there is a continuing downward rate of growth amongst most populations. However, it is also noted that the population of Roma continues to grow at a positive growth rate. What this means is that as Europe gets older, the younger generation is going to be in higher and higher percentages Roma. “While children make up between 26 and 34 percent of the Roma population, the share for non Roma is 10 to 13 percent. Similarly, due to lower life expectancy, there are many fewer elderly Roma than non-Roma.”⁸ Gábor Kertesi and Gábor Kézdi argue in their report on the long term budgetary benefits of improving educational opportunities for Roma, that increasing education, and consequently employment opportunities has a positive effect on the tax revenue. Additionally, “the deficit in Roma education outcomes in Hungary is associated with substantially lower employment earnings and consequently lower lifetime contributions to PIT, social contributions and VAT.”⁹ According to the authors investing in early childhood education for Roma will pay off in the short term, and the long term. Working with the premise that education is a clear route out of poverty because, to put it simply, a proper education will allow for greater job prospects. “The motivating idea behind our analysis is the notion that investing into somebody’s education will lead to benefits not only to the person in question but also to the whole society. We consider these social benefits in a very narrow sense: we make use the fact that in a typical modern society, more education makes people contribute more to the national budget and/or receive fewer transfers from it. The increased contributions and decreased transfers make up the net budgetary benefits. Net budgetary benefits measure a return on investments

⁸ Dena Ringold. “Poverty and Ethnicity: A Cross-Country Study of Roma Poverty in Central Europe” World Bank Technical paper no. 531. (2002) p 8

⁹ Gábor Kertesi and Gábor Kézdi. “Expected Long-Term Budgetary Benefits to Roma Education in Hungary.” Roma Education Fund (September 2006) 5

into education, very much like returns on any other financial investment.”¹⁰ The authors of this study point out that the vast majority of Hungarian Roma drop out of the school system without a secondary school degree (high school diploma) and only a very tiny fraction continues to higher education. The authors claim, which is supported by many in the field that low education in the general school system, as well as nearly pointless and useless skills learned in vocational training leads to extremely low employment prospects and is one of the most important reasons behind continued high levels of poverty within Roma communities. “The Council of Europe (1995) has defined poverty as affecting those "persons, families or groups of persons whose resources (material, cultural and social) are limited to the extent that they exclude them from the minimally accepted lifestyle of the countries where they live.”¹¹

According to Dena Ringold’s report for the World Bank, “Education status of Roma has historically been low across Europe. While significant gains were made in enrolling children during the socialist era.” However, “despite the achievements in reducing [il]literacy and increasing school participation, the efforts undertaken during the socialist era laid the foundation for inequalities in education quality, as many Roma were channeled into separate or segregated schools outside the mainstream system.”¹² Additionally, the report claims, “For long term development, the problem of low education levels may be the most pressing issue facing the Roma. Lack of education creates barriers to employment, healthy lifestyles, and participation in civil society. There is a close link between education and the risk of being poor in Central and Eastern Europe. Households headed by university graduates are much less likely to end up in poverty than others, while those with primary and narrow vocation training are at higher risk”¹³ In short, education can be viewed as the gateway to full

¹⁰ Gábor Kertesi and Gábor Kézdi. “Expected Long-Term Budgetary Benefits to Roma Education in Hungary.” Roma Education Fund (September 2006) 5.

¹¹ Ringold (2002) 11

¹² Ibid. 17

¹³ Ibid 24

enjoyment of citizenship. Without education, an individual is less likely to vote, less likely to be fully knowledgeable of their legal rights and privileges and more likely to suffer higher levels of poverty, and corresponding physical and psychological strain. According to Ringold, “Children from poor families are more likely to not attend or to drop out of school than other children for a range of reasons, including financial and opportunity costs, imperfect information about the benefits of education, limited choice and poor quality of educational services, substandard housing conditions at home that impede learning and studying, and poor health status.”¹⁴ In attempting to answer the hypothetical question of why it is still important to talk about race, since from a scientific standpoint it has been shown with great consensus that our differences are only skin deep. The color of skin is still an important part of our everyday life and regardless of who you are and where you are, this affects everyone. In the words of Nobel Laureate Toni Morrison:

Race has become metaphorical—a way of referring to and disguising forces, events, classes, and expressions of social decay and economic division far more threatening to the body politic than biological “race” ever was. Expensively kept, economically unsound, a spurious and useless political asset in election campaigns, racism is as healthy today as it was during the Enlightenment. It seems that it has a utility far beyond economy, beyond the sequestering of classes from one another, and has assumed a metaphorical life so completely embedded in daily discourse that it is perhaps more necessary and more on display than ever before.

Affirmative Action

In its most basic definition affirmative action is something that refers to “positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have been historically excluded. When those steps involve *preferential* selection—selection on the basis of race, gender, or ethnicity—affirmative action generations intense controversy.”¹⁵ Affirmative action is hotly contested both in the United States, where it is present throughout the high education system, and in

¹⁴ Ibid 25

¹⁵ “Affirmative action” Stanford encyclopedia of philosophy

many parts of the world. The point of affirmative action is to give preference to a minority or traditionally discriminated against group in order to give a level playing field. “James Rachels defended racial preferences as devices to neutralize unearned advantages by whites. Given the pervasiveness of racial discrimination, it is likely he argues, that the superior credentials offered by white applicants do not reflect their greater effort, desert, or even ability. Rather, the credentials reflect their mere luck at being born white.”¹⁶

Lyndon Johnson summed up the reason why there needs to be corrective action taken, instead of simply ending the discriminatory practices. “Lyndon Johnson, in a celebrated 1965 commencement address at Howard University, said that ‘you do not take a person who, for years, had been hobbled by chains and liberate him, bring him up to the starting line and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair’”¹⁷ Additionally, Justice Sandra Day O’Connor (retired) has stated that “the benefits [of affirmative action] are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high ranking retired officers and civilian leaders of the United States military assert that, ‘based on [there] decades of experience,’ a ‘highly qualified, racially diverse officer corps is essential to the military’s ability to fulfill its principal mission to provide national security.”¹⁸ The most common criticism of affirmative action policy is that it favors less qualified minority students over more qualified white students. However, this is an overly simplified argument that really misses the point of affirmative action. No one group is inherently smarter, more industrious, or cleverer than other group. We live in a multi-racial society and there is a perceived value in promoting racial diversity in various professions

¹⁶ Ibid

¹⁷ Greenberg (2010) 500

¹⁸ Gratz, et al. v Bollinger, et al., 539 US (2003), is the undergraduate case, and Grutter v Bollinger et al., 539 US (2003) is the law school case.

such as legal, medical and education. In order to do this, it is impossible to not take race into account as one of the factors in deciding school admissions. Jack Greenberg, of the Legal Defense Fund argues that there are several other situations where academics alone are not the deciding factor in school admission. Schools many times give preference to children of alumni, or candidates from wealthy families, or chosen based on athletic prowess rather than simply academics. Of course, in all of these situations the students need to prove competent and capable of handling the course load, but to argue that all of these students were granted admission based solely on academics is farcical. The point in admitting these students, as well as admitting a racially diverse student body is that it is beneficial for the whole university, community and society. Admitting students that will lead to financial gifts, allows the university in turn to support students from financially disadvantages backgrounds that otherwise would not be able to afford top quality education. There is value in diversity, which is why universities are interested in promoting this.

Justice Sandra Day O'Connor (retired) stated in the case *Grutter v. Bollinger* 539 U.S. 306 (2003)

The benefits [of affirmative action] are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high ranking retired officers and civilian leaders of the United States military assert that, 'based on [there] decades of experience,' a 'highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principal mission to provide national security.'¹⁹

Affirmative action has an important role to play in the integration of minority students into mainstream schools. I argue that the use of quotas and some form of affirmation action can be very beneficial in the case of the Roma.

In the 1960s affirmative action programs were becoming standard in education and government programs as courts began to realize that much more was needed in order to

¹⁹ *Grutter v. Bollinger* 539 U.S. 306 (2003)

bridge the achievement gap and ensure that doors were opened. However, affirmative action was not readily accepted by everyone, as many white individuals felt that they were being punished individually when they were rejected from schools for the wrongdoing their color group had done in the past. I argue that the claim that white suffering is not the appropriate respond to soften black suffering, in fact misses the point entirely. Statistics show that affirmative action programs are barely able to put a dent into the problem of achievement gaps. The debate over affirmative action in the United States has shifted, with the battle lines hardening after the decision in *Bakke v. Davis* in this case, the plaintiff, Bakke argued that he was rejected from the UC Davis medical school because there were spots set aside for minority students that then cut into his chances of acceptance. He contended that his higher scores were rejected in favor of minority students with lesser scores. In opposition to this assertion, Charles Ogletree Jr. contends that this is a false assertion. Ogletree argues that in truth, over one hundred white students from poor or otherwise disadvantageous backgrounds with scores as good as Bakke's were considered under the alternative admissions program UC Davis employed in order to achieve a greater diversity. Additionally, white students with lower scores were admitted, while Bakke was rejected. Ogletree argues, quite correctly, that black students did not prevent his admission, it was other students in general, and that better fulfilled the desire of the school that gained admission.

The most common example given to refute affirmative action is the hypothetical question of why should the son/daughter of a black neurosurgeon benefit from affirmative action and consequently the son/daughter of a poor coal miner in West Virginia made to suffer. No one contends that affirmative action is perfect, but then again, no respectable individual would contend that counting black slaves as three fifths of a person for matters of representation was 'perfect' either. Beyond this, as shown in the case of Bakke, it is not as simple as black beneficiary white suffering. It is not simply a matter of black and white but

also poor and affluent that plays a role in this debate. As argued in the following sections, affirmative action programs can play a vital role in the integration of schools. Albeit not always as successful as hoped, it is not a complete failure. Affirmative action, when looked at holistically, and not just admissions to university can be implemented successfully in some cases for the Roma in Hungary and Czech Republic.

Critical Race Theory²⁰

*In the name of equity, we...seek dramatic improvement in the quality of the education available to our children. Any steps to achieve desegregation must be reviewed in the light of the black community's interest in improved pupil performance as the primary characteristic of educational equality. -Coalition of black community groups in Boston*²¹

Although there is not a consensus, many scholars argue that there are multiple similarities between the Roma in Europe and African-Americans in the United States. Carline Emmons, presenting at the 2006 international studies conference, suggests, “The situation of the Roma is strikingly similar to that of African Americans in the South before the mid-1960s. Both share a history of slavery and oppression, as well as recognition that their own communities must lead the fight for reform. In fact, some Roma leaders have explicitly identified themselves with the American civil rights movement, saying that they are ‘waiting for their Martin Luther King, Jr.’”²² However, the similarities and usefulness in promoting a comparison go beyond the pre-1960s as Emmons suggested. In the United States, Hungary and the Czech Republic, there is an intersection between race, class, and poverty and power. In the United States the African Americans occupy the role of the under class while in Hungary and Czech Republic it is the Roma. This is not to suggest that the ‘cultural identity’

²⁰ This Section adapted from “Law and Ethnicity” Term paper, Spring 2010

²¹ Richard Delgado and Jean Stefancic. “Critical Race Theory: The Cutting Edge.” 2nd ed. Temple University Press, (1999) 236

²² Caroline Emmons “The Next Civil Rights Movement: Comparison of Roma and African American Freedom” International Studies Assoc. (2006) 1

or all of the experiences and discrimination suffered are similar or comparable as such, but what is striking about the experience of both blacks in America and Roma in Europe is the relationship they have with the culturally dominant group. It is important to note here that the Roma, is being used as a term to encompass several different groups that although with distinctions and variations, are collectively seen as the Roma, as a collective other by the culturally dominant group: Hungarians and Czech, and although the Roma in Hungary might have more to do with Hungarians than with the Roma from Czech Republic, this is not of particular importance to this paper.

The focus of this paper is about is the relationship and interaction between the majority and the minority. In this case the majority has constructed and defined the position of minority as being the African-Americans and the Roma. Furthermore, what is of particular interest here is the way in which institutions are designed in a society that results in one group ‘naturally’ succeeding while another group ‘naturally’ fails. This process, which will be discussed below leads to an internalization and reification of this differentiation of ability and a resulting stratification of society. These processes are slow, but, once in effect, become self-fulfilling prophecies and become harder and harder to change. In this paper I will be looking at the current trends and ideas within critical race theory, as well as the broader politics of recognition, as coined by Charles Taylor.

Critical Race Theory, and CRT in education is “a collection of activists and scholars interested in studying and transforming the relationship among race, racism and power. The movement considered many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in broader perspective that includes economics, history, context, group- and self-interest, an even feelings and unconsciousness.”²³ In this way it is taking everyday events and asking why did this happen? It is a rejection of the

²³ Richard Delgado “Critical Race Theory: An introduction.” (2001) 2

liberal view of color-blindness. It is asserting that race does matter, because people are human and take race into consideration. One cannot assume that because one lives in a liberal democracy, there will be no discrimination based on race because liberalism is race and colorblind because this is simply not true. David Theo Goldberg has argued that the major paradox of Western liberalism is that the desire to render race as a morally irrelevant category in the pro- motion of liberty and equality actually reproduces racial difference through materially based racial exclusions.²⁴ It is naive to suggest that liberalism in practice is color-blind. Neil Gotanda, in his article “A critique of ‘our constitution is color-blind’” critiques what advocates of the color-blind model argue, which is that it is important to not notice, or recognize race as a means towards equality. Instead, he argues, “Non-recognition is self-contradictory. Not only that but—non-recognition fosters the systematic denial of racial subordination and the psychological repression of an individual’s recognition of that subordination, thereby allowing it to continue.”²⁵ Gotanda explains that the employment of color-blind non-recognition is usually seen as superior to race-conscious decisions because it places merit as the most important aspect without corrupting the employer by viewing race. However, “in everyday American life, non-recognition is self-contradictory because it is impossible not to think about a subject without having first thought about it at least a little.”²⁶

The underlying point of this is that it is wrong to say that we do not take race into consideration that we are beyond race, because this is not the daily, lived reality of those that are negatively affected because of the race that they were born. It is important to note that this concept is something that can be applied to societies other than the United States. A very similar experience occurs in many of the world’s liberal democracies. Goldberg has argued

²⁴ Neda Atanasoski. “Race” Toward Freedom: Post-Cold War US Multiculturalism and the Reconstruction of Eastern Europe.” *Journal of American Culture* vol. 29 no 2 (June 2006) 214

²⁵ Delgado and Stefancic (1999) 35

²⁶ *ibid* 36

that the Western ideal of multiculturalism is based on the traditional premise of philosophical liberalism, which accepted “a pluralism of ethnic insight and self-determination provided [that] no particularistically promoted claim is inconsistent with the core [national] values’ In the US, these core national values are rooted in the capitalistic promise of free markets and competition. According to Peter McLaren, liberal multiculturalism in the context of free markets is based on the assumption that the “cognitive equivalence or the rationality imminent in all races...permits them to compete equally in a capitalist society”²⁷ Critical Race Theory sprang out of the realization that the way that the society, laws, and social interactions were engineered did not do enough to mitigate and dissolve the fact that different people are treated differently based on their perceived race. “CRT begins with a number of basic insights. One is that racism is normal, not aberrant, in American society. Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture. Formal equal opportunity—rules and laws that insist on treating blacks and whites [for example] alike—can thus remedy only the more extreme and shocking forms of injustice, the ones that do stand out. It can do little about the business-as-usual- forms of racism that people of color confront every day and that account for much misery, alienation and despair.”²⁸

Ladson-Billings, in the book Critical Race Theory in Education: All God’s Children got a song writes that “Race as a factor in inequality: The first proposition—that race continues to be a significant factor in determining inequality in the United State—is easily documented in the statistical and demographic data. Hacker’s (1992) look at education and life chances such as high school dropout rates, suspension rates, and incarceration rates

²⁷ Atanasoski (2006) 214

²⁸ Found at: http://www.temple.edu/tempres/chapters_1100/1169_ch1.pdf (No citation available)

echoes earlier statistics compiled by the Children's Defense Fund.²⁹ Ladson-Billings notes that race from a purely biological genetic standpoint, hardly makes sense, especially when trying to document all of the 'mixing' and changing et cetera. However, even when race does not make sense, we still employ it, and because we still employ it, it is still very relevant. According to Nobel Laureate Toni Morrison: Race has become metaphorical—a way of referring to and disguising forces, events, classes, and expressions of social decay and economic division far more threatening to the body politic than biological "race" ever was.³⁰ We argue that the current multicultural paradigm functions in a manner similar to civil rights law. Instead of creating radically new paradigms that ensure justice, multicultural reforms are routinely "sucked back into the system" and just as traditional civil rights law is based on a foundation of human rights, the current multicultural paradigm is mired in liberal ideology that offers no radical change in the current order. Thus, critical race theory in education, like its antecedent in legal scholarship, is a radical critique of both the status quo and the purported reforms.³¹

Although there is not a consensus on the parameters of CRT, and different scholars advocate for slightly different things within the discipline, there are several key concepts that are pretty much agreed upon as the basis of the discipline. The first is the idea that racism is ordinary, and pervasive throughout normal daily life. Racism is not just the most blatant forms of discrimination like for example a white doctor refusing to treat a black patient, or a justice of the peace refusing to marry a mixed race couple. Although these things do happen, they are abnormal and are vilified by society. Interestingly, society as a whole is able to push the idea that racism no longer exists as a normal part of society specifically because these examples just given as seen as so abnormal and are thoroughly vilified by the mainstream.

²⁹ Edelman, Children's Defense Fund (1987)

³⁰ Ladson-Billing and William F. Tate IV "Toward a Critical Race Theory of Education" Teachers College Record volume 97, no 1 (Fall 1995) 49

³¹ *ibid* 10

However, this act in fact used to cover over and ignore the less obvious forms of racism and differentiated treatment based on race. “Studies show that blacks and Latinos who seek loans, apartments, or jobs are much more apt than similarly qualified whites to be rejected...The prison population is largely black and brown; chief executive officers, surgeons, and university presidents are almost all white. Poverty however has a black or brown face: black families have on average, about one-tenth of the assets of their white counterparts.”³² The second main concept is “that our system of white-over-color ascendancy serves important purposes, both psychic and material.... sometimes called ‘interest convergence’ or material determinism, adds a further dimension.”³³ What this means is that since elites and working class have little to gain apart from egalitarian moral gains from the eradication of racism because it inherently, throughout the system favors whites in terms of job acquisition and education, it is not incentivized. The third concept that is generally agreed upon is that race and the categorization of different races is a social construct. There are no objective races, these differences are created, expanded and used as a means to control the distribution of goods and services. These categories are created by society, manipulated, and then even forgotten about as it suits society. According to Quadagno and Katz race is a fundamental part of society and it influences issues of poverty. They are suggesting that there is a link between racial hierarchy and class distinctions.³⁴ This is something that can be applied to the US and Hungary and Czech Republic.

In Central and Eastern Europe this issue is highlighted by some Roma moving into the middle class, highlighting the destitute situation of those left in the underclass. In their book Patterns of Exclusion: Constructing Gypsy Ethnicity and the Making of an Underclass in Transitional Societies of Europe by Janos Ladanyi and Ivan Szelenyi, they point out the

³² Delgado and Stefancic (1999) 10

³³ Delgado and Stefancic (1999) 7

³⁴ James Jennings and Louis Kushnik. “A New Introduction to Poverty: the role of race, power and politics.” New York Uni. Press (1999) 5

patterns by which, similar to trends in the United States, institutions are created to promote the success of some groups at the expense of others. They focus on the stratification of society in the post 1989 Europe and the solidification of an underclass.

Julia Szalai's³⁵ paper, "Power and Poverty" has several large implications for our understanding of society. Most importantly, the author is arguing that we cannot view poverty as laziness or individuals doing something wrong, in general. It is important to reevaluate the relationship between people in poverty and the state. She is arguing that although the state is helping people 'survive' on the one hand, the state, as the source of power is also keeping people in poverty. This has huge implications for rethinking how welfare policy is created and administered. Szalai is arguing that the issue of poverty, as a phenomenon, is greater than simply an issue of inequality of distribution. Additionally, since the transition to market economy, the issue of poverty was 'depoliticized' and considered to be a natural part of the market economy. The author links poverty directly to exclusive reliance on state support. Szalai argues that this was true during communism and also now, with those living in poverty under the direct control of local welfare offices. This analysis is helpful in our general understanding of the interaction between poor Roma, and the dominant society, and the state.

Critical race theory in the United States is a useful concept in dissecting and understanding the processes by which individuals from one group seem to naturally succeed and individuals from another group seem to naturally fail. Additionally, CRT and texts that look at the intersection of race poverty and power are helpful in understanding both from the United States and Europe why there is a stratification of classes in society, as well as

³⁵ Julia Szalai. "Power and Poverty: Socialist Second Economy and Self-Protection Against Poverty in Hungary"

pervasive whiteness and institutionalized prejudice that can be understood better through CRT.

Defining Roma

It is not such a clear-cut, easy to answer question 'who the Roma are.' It is difficult to pinpoint who exactly 'The Roma' is referring to. The group of people that are collectively referred to as the Roma are incredibly diverse, spanning all countries in Central and Eastern Europe and in smaller but still significant numbers in western Europe, and in many other parts of the world. However, for the purposes of this thesis, the term Roma is meant to encompass those individuals in the Czech Republic and Hungary that either identify as part of the Roma minority, or are externally identified by local authorities, school authorities and administrators. "Roma, or 'gypsies,' are a unique minority in Europe. Unlike other groups, Roma have no definite historical homeland and are found in nearly all countries in Europe and Central Asia.

Current estimates suggest that between seven and nine million Roma live throughout Europe, making them the largest minority in Europe. Their origins are the subject of much debate. Historical records indicate that Roma migrated from northern India into Europe in waves between the ninth and fourteenth centuries.' While some Roma groups are nomadic, the vast majority of Roma in Central and Eastern Europe have settled, some during the Austro-Hungarian and Ottoman empires, and others more recently under socialism."³⁶

A defining characteristic of Roma is their diversity. There are numerous subdivisions of Roma based on various crosscutting divisions, including family groups and religion. Ethnographers have identified 60 different groups in Bulgaria and similar diversity is believed to exist in other countries. In addition to these ethnic differences, there is significant diversity among Roma settlements: rural/urban, assimilated/non-assimilated, homogenous/heterogeneous, as well as affiliations with different religious denominations. Some groups speak variations of the Roma language, while others do not. As a result, analysis of Roma as a group is extremely difficult.

³⁶ Ringold (2002) 30

There is no consensus on who the Roma are. They are in actuality a highly heterogeneous set of sub-groups. For this paper I am using a very broad understanding which includes those that self-identify as Roma as well as those are identified by the majority population as Roma. I chose to do this for the very simple reason that discrimination is an action occurring from the majority to the minority, and so what really matters, somewhat unfortunately is the majority populations perception and not only self-identification.

Chapter Two - United States: *Brown v. Board of Education*

“We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future... [U]nless our children begin to learn together, there is little hope that our people will learn to live together.” –Millikin v. Bradley, 418 U.S. 717, 783 (1974) Marshall, J., Dissenting

“Brown is more accurately characterized as a first step in a long, arduous process to rid the nation of its most pernicious demons— racism and White supremacy. While we celebrate its potential, we must be clear about its limitations. The nation has never fully and honestly dealt with its “race” problem.”³⁷

Brown, which reversed the precedent set in *Plessy v. Ferguson* which had codified the notion of separate but equal, is many times hailed as one of the most important cases of the twentieth century, and one of a handful of cases that every schoolchild in America should be taught. The victory for civil right and equality in *Brown* is generally hailed by the political elite, the media, and the general public as a major achievement for advancing equality and the ideals of the Declaration of Independence. With the unanimous decision in *Brown* barriers were destroyed and the American dream was made available to a section of American society that had faced hundreds of years of legal slavery, discrimination and countless roadblocks to a successful and prosperous and secure life. It can be strongly argued that no social change has been as fiercely fought against, as was the case with school desegregation. *Brown* struck at the very center of racial institution in the United States, “it changed education of children

³⁷ Gloria Ladson-Billings “Landing on the Wrong Note: The price we paid for Brown.” Educational Researcher, vol. 33, no. 3 (2004) 10

in ways that directly challenged the racial traditions and beliefs and traditional school practices in thousands of communities.”³⁸

However, as is often the case with such overly simplified issues, and in spite of the near obsessive political grandstanding on the achievements of *Brown*, the actual decision in the case, and the results, now over fifty years in the making, are much more complex, disheartening, and open to manipulation and mitigation than is widely accepted or assumed. “Although the U.S. has some of the best public schools in the world, it also has too many far weaker than those found in other advanced countries. Most of these are segregated schools which cannot get and hold highly qualified teachers and administrators, do not offer good preparation for college, and often fail to graduate even half of their students.”³⁹ In short, the record on *Brown* is mixed at best.

In this chapter, I will focus on several different aspects of this case. *Brown* was the result of a carefully choreographed and developed litigation plan that diverged greatly from the tradition role of lawyer representing the narrowly focused needs of a client. Instead, the lawyers working on this case from the Legal Defense Fund of the National Association for the Advancement of Colored People pursued what has now become known as public interest law, working to win court victories that would affect greater swaths of America than simply the narrow complaints of the citizen plaintiff. Therefore, I will focus in part on the individuals involved in the design and execution of the court case.

Secondly, it is critical to focus on the ruling that the Court produced, and the politics and strategy behind the decisions. There were several considerations that the Court took, and the wording of the decisions in both *Brown I* and *Brown II* (which outlined the ways in which desegregation was to be enforced by the lower courts) is critical to the result that followed.

³⁸ Gary Orfield & Chungmei Lee “Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies”

³⁹ *ibid*

Thirdly, and perhaps most related to the title of this thesis, I will focus on post-decision. In the last 56 years there has been an immense amount of progress in the advancement of black Americans and other minorities, however, the progression of civil rights and the granting of full and equal citizenship to black Americans has not flowed entirely in a positive direction. *Brown* is hailed as groundbreaking, as game changing and as opening the door to a new era in America. However, this glorification and idolization of *Brown* allows for all of the less pleasant parts of race relations and the darker side of education politic and race in America to be overlooked and sweep under the rug.

The record on integration and racism is a lot more complex than the general commentary on *Brown* allows for. Although blacks in America are in positions of power and prestige at higher rates than ever before, covert, institutionalized racism is still present in the American system, and has manifested itself in several ways post-*Brown*. There continues to be a large overlap between race and class, where whites are generally at higher levels of income and other standard bearers such as rates of home ownership than blacks and other minorities. In the aftermath of the decision, and during efforts to enforce the decision, a trend termed ‘white-flight’ emerged where at a minimum whites left cities for the suburbs in high numbers. Perhaps more alarming, and with stronger racial overtones, as schools became integrated and the number of minority students is increased, white parents removed their children from the public school, opting instead for private or parochial education.

What did the decision say?

The Supreme Court Justices understood the importance and potential explosiveness of the issue at hand in deciding *Brown v. Board of Education*. “On May 17, 1954, an otherwise uneventful Monday afternoon, fifteen months into Dwight D. Eisenhower’s Presidency, Chief Justice Earl Warren, speaking on behalf of a unanimous Supreme Court, issued a historic ruling that he and his colleagues hoped would irrevocably change the social fabric of the

United States.”⁴⁰ The two sentences that summarize the heart of the judgment are “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”⁴¹ In response the New York Times extolled the decision in *Brown* as having “reaffirmed its faith and the underlying American faith in the equality of all men and all children before the law.”⁴² The case was actually the culmination of five separate cases that were presented before lower courts, and then rolled into this one larger case.

Although it is often claimed that Oliver Brown was named plaintiff due to being first on the alphabetical list. It was also a strategic decision on the part of the legal team to have the lead named plaintiff an ‘upstanding member of society’. Brown was an assistant preacher in his church, was employed and in a whole and intact family. He was strategically chosen because he represented black men in the best possible light and was a living refutation of the common misconceptions and assumptions about black Americans, and specifically black men. Each of the plaintiffs were chosen as perfect examples of what was wrong with the system of separate but equal. The case was not simply about Linda Brown, or physical hardship that she suffered due to being barred from attending the school closest to her. The case was about children in four different states that suffered not only physical hardship but also psychological suffering as a result of segregation in education. Oliver Brown, on advice of the NAACP, which was coordinating the effort, attempted to register his daughter in the neighborhood school, which at the time was exclusively white. Linda Brown, the daughter, had been forced to walk several blocks to take the bus to the segregated black school, Monroe Elementary, which was one mile away.

⁴⁰ Charles Ogletree. “All Deliberate Speed.” W.W. Norton & Co., 2005. 3

⁴¹ Ibid

⁴² ibid

The Decision in *Brown* was complicated by it actually being two separate decisions. In the first decision, the Court found that segregation in education, was inherently unequal, reversing the precedent of *Plessy v. Ferguson*, however it was not until the second decision by the Court that outlined how this was to be implemented. As is shown by the phrase “with all deliberate speed” and the last half-century to reflect on, one can see that the route that desegregation would take would be slow and slow. “Whereas *Brown I* made possible the institutional equality first promised in 1776 with the Declaration of Independence and again in 1865 with the ratification of the thirteenth and fourteenth amendments, *Brown II* created the method and manner in which America would resist the mandate of the equality ideal.”⁴³ Gloria Ladson-Billings, one of the leading academics on Critical Race Theory, and education states “Of course one of the major problems that we have in understanding *Brown* is that we conflate two incompatible decisions—*Brown I* and *Brown II*. *Brown I*, the May 1954 decision is the right decision, the one that pronounces the principle of separate as inherently unequal. *Brown I* is totally congruent with the principles of democracy and what the nation claims to stand for. *Brown II*, on the other hand, is the implementation phase of the decision.”⁴⁴ Ladson-Billings goes further in arguing that “even as *Brown I* attempted to rend us from a racially troubled past, *Brown II* worked to suture us to that history. By allowing school districts to use delaying tactics and endorsing their legal challenges the federal government effectively backed away from a new vision of the United States.”⁴⁵

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may

⁴³ *ibid* 306

⁴⁴ Ladson-Billings (2004) 6

⁴⁵ *ibid* 11

reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms. We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors maybe equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.⁴⁶

What is absolutely clear is that the difference between the soaring rhetoric of the first decision and the second decision is that in the second decision, schools were given a mechanism to move at their own pace. Looking back now though, it is clear that schools were not willing to change from the status quo until they were absolutely required to. In looking at the two cases involving the Roma, we find the same situation to be true. As long as enforcement mechanisms are not created and enforced, it is difficult to change the status quo.

Justice Sandra Day O’Connor (retired) stated in the case *Grutter v. Bollinger* 539 U.S. 306 (2003):

The benefits [of affirmative action] are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high ranking retired officers and civilian leaders of the United States military assert that, ‘based on [there] decades of experience,’ a ‘highly qualified, racially diverse officer corps is essential to the military’s ability to fulfill its principal mission to provide national security.’⁴⁷

The Case of *Brown* and the reality of 56 years of experience of trying to enforce and live with the decision provides us with an excellent opportunity to analyze the following two cases *D.H. and other* and *Miskolc Desegregation* in order to learn form the mistakes and successes of *Brown*.

⁴⁶ Ogletree (2005) 6 (chief justice earl warren)

⁴⁷ *Grutter v. Bollinger* 539 U.S. 306 (2003)

Chapter Three – Czech Republic: *D.H. and Others v. Czech Republic*

Background: Roma in Czech Republic:

“Although the 2001 official census registers only 11,746 people of Romani ethnicity from a total population of 10.2 million, estimates - including the government’s - give a more realistic figure of 150,000 to 300,000 or about 1.6 to 3 per cent of the overall population. The majority of the current Romani population in the Czech Republic came from Slovakia, forcibly or voluntarily, as most of the original Romani minority was exterminated in concentration camps during World War II. The Romani population in the Czech Republic is primarily concentrated in the northern part of the country – in Northern Moravia (Ostrava, Karviná), Northern Bohemia – and in urban areas, such as Prague and Brno.” (Amnesty report 7)

“The situation of Roma in the Czech Republic continues to be highly unsatisfactory. The Roma constitute the overwhelming majority population in the country’s more than 300 socially disadvantaged localities, often living in de facto “ghettos” separated from the non-Roma majority. They suffer from extremely high levels of unemployment and a low level of education. More than 60 per cent of the Roma of working age residing in marginalized localities are unemployed.”⁴⁸

In regard to education, roughly 80 percent of working age Roma do not have above an elementary education. Additionally, the vast majority of Roma, as confirmed in the European Court’s judgment, receive a lower quality education in highly segregated facilities.⁴⁹

According to the Court documents, states that “data supplied by the applicants, which was obtained through questionnaires sent in 1999 to the head teachers of the 8 schools and 69 primary schools in the town of Ostrava, the total number of pupils placed in special schools in Ostrava came to 1,360, of whom 762 (56%) were Roma.

⁴⁸ Amnesty International “Injustice Renamed: discrimination in education of Roma persists in the Czech Republic (2010)

⁴⁹ Ibid

Conversely, Roma represented only 2.26% of the total of 33,372 primary-school pupils in Ostrava. Further, although only 1.8% of non-Roma pupils were placed in special schools, in Ostrava the proportion of Roma pupils assigned to such schools was 50.3%. Accordingly, a Roma child in Ostrava was 27 times more likely to be placed in a special school than a non-Roma child.”⁵⁰

As focused on below, one of the interesting, and important aspects of the Court’s decision in this case is that they looked beyond, almost ignoring the specific cases in from of the Court to focus on the broader patterns of systemic discrimination arising from a seemingly neutral law on education. Additionally, although the state has taken some measures to abide by the Court ruling, the result so far has not been very promising, with the majority of changing occurring on a facial or shallow level rather than a truly substantive shift in the structure and pedagogy of primary and secondary education. “Inspired by Soviet educational dogma, in the Czech Republic, as in many other Central European countries, a system of special schools had been established during Communism and maintained for decades even after studies by social scientists, psychologists and teachers found clear patterns of system failures resulting in ethnic discrimination.”⁵¹

The case of *D.H. and Others v. Czech Republic* revolves around whether the disproportionately high number of Roma students placed into special education facilities for students with mild to severe mental deficiencies was a violation of the students rights under article 14 of the European Convention on Human Rights (The Convention) read in conjunction with article two of protocol one. Ultimately, the European Court of Human Rights (ECHR), which is the arbitrator of issues arising under The Convention, found that the students had suffered from indirect discrimination and their right to equal treatment, and more specifically to be treated no less favorable than Czech students, had been violated. The Plaintiffs were eighteen children that were born between 1985 and 1991 and placed into

⁵⁰ *D.H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006

⁵¹ Lilla Farkas. “The Scene After Battle: What is the Victory in *D.H.* Worth and Where to Go From Here?” *Roma Rights Journal*, Budapest. (2008) no 1.

special remedial schools in the Ostrava region of the Czech Republic. The case faced several setbacks before ultimately reaching success with the Grand Chamber of the ECHR.

Originally, the European Roma Rights Center, which took the lead, along with other NGOs such as the Open Society Justice Initiative and the European Roma Information Office petitioned the Czech constitutional court to find that the rights the children had been violated. However, the court dismissed the case on October 20, 1999. Similar to the role that the LDF and the NAACP played in litigating desegregation in the United States, and especially in what is considered their major victory and tipping point with the case of *Brown v. Board* “The ERRC and its allies have fought dozens of cases before European and international fora – first and foremost the European Court of Human Rights (ECtHR). None of these actions has however been as strategic, laborious and lengthy as the litigation in *D.H.*”⁵² This case was important, not only for the verdict in the instant case, but for the precedent that it sets, and its evolution of indirect discrimination within international law. However, before the ERRC got to the final verdict from the Grand Chamber of the Court, the case had to make its way first through the domestic courts and lower courts. “The [Czech Constitutional] Court dismissed the case in part because thirteen of the eighteen applicants had failed to exhaust the school system’s appeal process for special school placement and, therefore, did not have grounds for a petition to the court.” Additionally, the court “claimed a lack of competency to hear the case, because no legal provision had been interpreted or applied in an unconstitutional manner.”⁵³ In the wake of this decision, the ERRC, and the eighteen plaintiffs decided to petition to ECHR arguing that “their special school placement violated articles 3, 6 and 14 (read in conjunction with Article 2 of Protocol no. 1) of the European

⁵² *ibid*

⁵³ Jennifer Devroye. “The Case of *D.H. and Others v. the Czech Republic.*” *North Western Journal of International Human Rights*. Vol. 7, no. 9. (2009)

Convention.”⁵⁴ Additionally, “the Applicants alleged, *inter alia* that they had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin.”⁵⁵ The twelfth chamber of the Court heard the case. However, in issuing its decision, the Chamber found no evidence that the rights of the plaintiffs had been violated. Importantly though, “In his concurrence, Judge Costa of France noted that the Grand Chamber might be ‘better placed than a Chamber’ to find that Article 14 had been violated, because the existing case law did not support such a finding.”⁵⁶ In 2006 the applicants petitioned and were granted an appeal to the Grand Chamber of the ECHR.

Under the Court decision section C. “the facts of the instant case” the Court states “Between 1996 and 1999 applicants were placed in special schools in Ostrava, either directly or after a spell in an ordinary primary school.”⁵⁷ It is further noted that in each of the case the parents had consented to the school switch, and in certain cases had even requested that the child be switched. This is a practice that is also common in the Hungarian case, where Roma parents and students in many cases prefer for the pupil to be in the special school because it is predominantly Roma and the child will be safer their and face less immediate discrimination and bullying. However, as shown in the Court’s decision, the decision of the parents in this case does not overrule the state’s express obligation to provide and ensure quality education to all students. In other words the choice to better education but constant discrimination and harassment or low quality education and low discrimination is not a real, and valid choice that the parents or student should be forced to make.

Before entering the special school the children is meant to undergo psychological testing to ensure that it is appropriate to move the child to the special school with reduced

⁵⁴ *ibid*

⁵⁵ *D.H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006

⁵⁶ Devroye (2009) 82

⁵⁷ *D.H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006. 5

curriculum.⁵⁸ However, according to the Commissioner for Human Rights (Council of Europe) observed “Roma children are frequently placed in classes for children with special needs without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin.”⁵⁹ This is the crux of the argument between the Czech Republic and the applicants. The government claimed that the law was not designed to discriminate and that if a larger number of Roma were enrolled in these schools it was clearly because of other factors such as level of value of education exhibited at home, or inability to compete in the more rigorous environment. The applicants argued that the testing used, which at various points the state has admitted is biased, did not appropriately or validly test the means of the child, but were designed in such a way to favor ethnically Czech students over Roma students. This was done by not taking into account the peculiarities, or differences of the Roma students and where the design of the test was such that it reflected the average ethnic Czech’s experience. “The assessment of Roma children in the Ostrava region did not take into account the language and culture of the children, or their prior learning experiences, or their unfamiliarity with the demands of the testing situation.”⁶⁰ The Court found that the school placement through the use of psychological testing often times reflected the racial biases of the society at large.

According to the United Nations Human Rights Committee, discrimination is defined as “any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and

⁵⁸ For example, students in the special schools are not expected to know the Czech alphabet or know their numbers until the 3rd or even 4th grade, while this knowledge is acquired in the first year of a normal curriculum school.

⁵⁹ D.H. and Others v. Czech Republic, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006. 12

⁶⁰ *ibid*13

freedoms.”⁶¹ Additionally, the ECHR states “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realized.’” (European Court) The applicants claimed both direct and indirect discrimination. These are recognized as separate forms of discrimination under international law. “Direct discrimination is unfavorable treatment that is, on its face, based on a prohibited ground. Direct discrimination may be “open”, that is, explicit in the text of a law or clear from a particular practice. It can also be “hidden” but nevertheless identifiable.” On the other hand, “indirect discrimination occurs when an apparently neutral law, rule, procedure or practice results in a disproportionate disadvantage for, or disparate impact on, a particular group, which has no objective or reasonable justification. It is the effect of a standard or practice upon a particular group, and not necessarily the intention, that matters in determining whether this type of discrimination has occurred.”⁶² The Court recapitulated in its judgment that discrimination based on ethnicity or ethnic origin is a form of racial discrimination which is particularly invidious and required that the state be particularly vigilant in protecting against this.

An additional important victory in the decision was that courts decision to put the burden of proof on the shoulders of the state rather than the applicant. Again, broadening the judgment the Court looked at the general trends of discrimination rather than simply the specific claims of the instant case, and found that there was discrimination, putting the burden on the state to explain why this was necessary and not invidious. The Court found that even though the Czech Republic has put forth some efforts, and in comparison to other countries in the region is acting as a leader in promoting education, the applicants in the case exemplify a

⁶¹ Amnesty International. “Injustice Renamed: discrimination in education of Roma persists in the Czech Republic (2010) 8.

⁶² Ibid 8

wider pattern of discrimination, indirectly, as a result of the design of school assessment processes. This was a landmark case precisely because the court found evidence of indirect discrimination against the eighteen applicants, but also against the wider Roma population. “The implementation of these measures is subject to the control of the Committee of Ministers. Under Article 13 of the European Convention, states must give an “effective remedy” for rights violations. Remedies must be ‘reasonably speedy’ and ‘effective in both law and practice.’”⁶³ Each of the applicants was awarded 4,000 euros and then 10,000 euros was awarded to cover the costs of the litigation.

School Act of 2005

During the litigation, the government pursued some reform of the school system with the new Schools Act, which came into effect in January 2005. This legislation replaced the early legislation, which was at the heart of the case in front of the Court. However, it has become increasingly clear that although the legislation has changed, the practicalities, and the actions in schools and communities throughout Czech Republic have shifted very little. Both Amnesty International and the European Roma Rights Center carried out fact-finding missions in the Czech Republic after the decision in *D.H. and Others* with the ultimate realization that in fact, very little has changed. According to the ERRC report on segregation in education in the Czech Republic, the fact that even after the special schools were renamed practical primary schools, they were still kept under the authority of the regional authorities whereas the standard primary schools are under the administration of the municipal authorities. This is simply another way to keep the two systems in place, and inherently unequal.

⁶³ Devroye (2009) 96

The ERRC report found that amongst school and regional authorities, the overarching concept in discussing the transfer of students from one type of school to another is parental consent or request. However, the report points out, and reaffirmed in the D.H. court decision that there is a significant deficiency in the amount and quality of information available to parents regarding the types of schooling available and the long-term consequences of the choices made. As was the case with the applicants in D.H. the government defended the education they were provided with because in many cases the parents had specifically requested it. The Court found this to be insufficient because, as mentioned earlier, it provided the unrealistic and unfair decision between access to quality education in a discriminatory environment, or lower quality education in a more welcoming environment. Although the change in name, from special remedial school for children with slight mental deficiencies to ‘practical school’, which is then grouped under the same banner as all primary schools, has had the effect of reducing the stigma of attending, it has the deleterious effect of adding further confusion to parents, who become more willing to send their children there, assuming they will have a high level education. Under the new Act, according to Amnesty, “the attribute ‘practical’ is often not mentioned in the official title of the school, as now the official category in the law is simply “elementary school”. This name change does not mean that children who had been wrongly placed in those schools have been transferred to another school corresponding to their actual abilities and skills.”⁶⁴

However, the Czech Government has been quick to claim that with the new Act, everything is fine presently. Some have even gone so far as to admit that in the past there were problems, but that now, it is completely resolved. “Dzamil Stehlíková, Minister for Human Rights and Minorities at the time when the judgment was issued, stated that “[t]he criticism is probably justified, when we look into the past, but the situation has changed very

⁶⁴ Amnesty (2010)16.

much since [...]. This case is an old debt, a skeleton that has fallen out of the closet.’”⁶⁵ This view, that everything that was wrong has now been made right, completely ignores that fact that the high levels of discrimination, and funneling of Roma students into lower quality schools in high percentages is much more pervasive and throughout society that can be rectified in the renaming of schools. The Czech government has admitted this. The Czech Minister of Education, Youth and Sports acknowledged at a June 2008 conference press release stated “our education system unfortunately still has elements, which are justly labeled as segregative’ and that Romani children are wrongly placed into schools with lower standards”⁶⁶ The common theme between the different cases that are discussed is that people resist change as much as they are allowed. For most people the status quo is safe, and it is preferred. In the aftermath of *Brown v. Board*, the United States witnessed an immense amount of backlash to integration, and as shown above, starting with the why in which the judgment was written, and throughout the roughly fifty five years since the case was before the Supreme Court, the decision has been slowly undermined and chipped away at. This is the reality of the situation in Brown, and this is the reality of the situation in the Czech Republic. The Brown decision, and the subsequent efforts towards integration gave cover to those that declared that segregation, and inequality in education was henceforth dead. It allowed for false notion of equality and common respect, where in reality education is still severely segregated in the United States where there is a high correlation between quality of education available and the racial and ethnic makeup of the student body. The point is that this is also true in the Czech Republic. What one finds in the Czech republic is very little change below the surface. What has changed is that now, officials are able to claim that these issues have been rectified, that the problems have been solved, and that there is no longer

⁶⁵ Amnesty (2010)19.

⁶⁶ ERRC: “Persistent Segregation of Roma in the Czech Education System” pre-publication draft report. (2008) section 4.1

discrimination in education. In reality, it has just driven the discrimination slightly more underground, more covert rather than overt.

The ERRC interviewed, in the course of their investigation of the changes following the court decision in D.H., twenty directors of practical primary schools. Each of these directors confirmed to the ERRC “the curriculum taught in the school has not changed after the Schools Act introduced.”⁶⁷ What this means is that these schools are still teaching from the curriculum that was developed in 1997 for children with mental disabilities. Additionally, “The new school law changed only the names of schools. Otherwise everything is the same. These types of schools existed previously as well.” Director of a Special Pedagogic Centre in Ostrava, April 2009”⁶⁸

⁶⁷ ERRC (2008) section 4.2

⁶⁸ Amnesty (2010)

Chapter Four - Hungary: Miskolc Desegregation Case

The third case of strategic litigation arises from the Northern Hungarian city of Miskolc. Although this case moved through the Hungarian domestic court system, the issues at stake, and the focus on strategic litigation with the goal of desegregation, make it highly germane to the overall focus of this thesis, and specifically to *Brown v. Board* and *D.H. and Others v. Czech Republic*. This case was spearheaded by the Chance for Children Foundation, in Hungary (CFCF). According to the website of the CFCF, their especially mission and purpose is to represent disadvantaged children, with a focus specifically on Hungarian Roma in combating discrimination and differentiated treatment in education. The CFCF finds that although there are many anti-discrimination laws, both Hungarian and from the European Union and the Council of Europe, the facts on the ground are that discrimination and segregation in education is still wide spread and negatively affects the educational and professional prospects of thousands of children. The CFCF believes that the only way to compete in the modern globalizing world is through education. Roma children are routinely denied access to education at a level sufficient to acquire the skills necessary to compete professionally in this globalizing world.

Hungary, according to the CIA world fact book has a population of nearly ten million, with the Roma constituting nearly two percent of the population according to official census data.⁶⁹ However, unofficial estimates put the total Roma population between five and six percent of the population at roughly 580,000.⁷⁰ “The Hungarian education system is decentralized and maintained by local authorities. The state has very little control. After communism, Hungary tried to create a very liberal system that gave local communities a great deal of power and freedom. While perhaps a good idea in theory, it has actually been

⁶⁹ CIA World Fact Book: Hungary 2010. see: <https://www.cia.gov/library/publications/the-world-factbook/geos/hu.html>

⁷⁰ Roma Education Fund report. “Advancing Education of Roma in Hungary” (2007) 9

harmful.”⁷¹ Additionally, the government has a favorable anti-discrimination legal framework, focused around the Act on Equal Treatment and the Promotion of Equal Opportunities, the Civil Code, and the Public Education Act. According to the Roma Education Fund report on Hungary, the risk of poverty in Hungary is determined primarily by four factors: education and labor market situation; demographic indicators; geographical location and type of dwelling; and ethnicity. Around one third of Hungary’s Roma are affected by extreme poverty and most of these live in Roma settlements.⁷² In addition to these staggering numbers, since the change in political system in 1989, the economic situation of the Roma in general has drastically declined. The number of Roma considered poor has more than doubled. This can be attributed to high levels of redundancies in the types of jobs that Roma were typically employed in under communism. The numbers of people who are perpetually unemployed, who live on the absolute margins of society, have significantly grown since the transition and the percentage of this group that is Roma is incredibly high. What I have argued in previous sections is that the key to escaping poverty is through education. Segregation in education is a very real phenomenon in Hungary.

In 2005 the CFCF brought an action popularis claim against the local council of Miskolc.⁷³ The claim alleged that the council was indirectly responsible for the continued segregation of Roma students in primary education. One of the initiatives from the state government to encourage integration is increased funding for schools that take socially disadvantaged children. This initiative will be discussed in further detail below, but in short, seven schools in Miskolc decided to administratively and financially merge into three larger administrative and economic units in 2004. However, the schools opted to continue to operate in separate buildings. Prior to merger, the schools were largely segregated, however,

⁷¹ Greenberg (2010) 960

⁷² REF (2007) 9

⁷³ Chance for Children Found. v. Local Council of Miskolc, Pf.I.20.683/2005/7 (Debrecen App. Ct. 2005), available at http://www.cfcf.hu/miskolc1_en.html

after the merger the whole administrative units looked integrated on paper, making the school district eligible for increased funding. However, although the schools combined, they did not at first rewrite the catchments areas, the areas from which each school draws its students. This meant that although the schools were merged and integrated on paper, the actual situation in reality was as segregated as previously.⁷⁴ “On 9 June 2006 the Debrecen Appeals Court overruled the first instance judgment in the *Miskolc Desegregation Case*. It found that by the decision that integrated seven schools without simultaneously redrawing the catchments areas Miskolc upheld the segregation of Roma children, thus violating their right to equal treatment based on ethnic origin.”⁷⁵ Under the Hungarian Constitution, there is what is considered a universal voucher system. What this means is that each student has the right to attend the school in their neighborhood, but additionally, every child has the right to apply to any other school. However, schools have the right to pick and chose whom they will accept from outside of the district.

In the judgment that the Debrecen Appeals Court handed down, they “agreed with CFCF in that not only active, but also passive conduct could lead to a breach of the obligation of equal treatment, especially of the obligation to accord similar quality service in education to all. The court noted Miskolc’s efforts at integration, but it found them belated with respect to redrawing the catchments areas.”⁷⁶ However, the court declined to directly oversee a desegregation plan, at which time the CFCF requested that the Equal Treatment Authority

⁷⁴ Hungarian law requires a plan for enhancing equal opportunities in public education if a municipality is to receive money from a tender for educational purposes financed by the E.U. or the Hungarian government. On Equal Treatment and the Promotion of Equal Opportunities, Act no. CXXV of 2003, para. 35, available at www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex3.pdf (on file with the Columbia Law Review). In order to receive this money, a school need not have desegregated, but it must have a plan for desegregation. (Footnote 131, Greenberg, Jack. “Report on Roma Education Today”

⁷⁵ Lilla Farkas. “Appeal Leads to Victory for the Roma in Miskolc” July 7 2006 (<http://www.libertysecurity.org/article1042.html>)

⁷⁶ *ibid*

commence *ex officio* proceedings against the Miskolc municipality to focus on the segregation of Roma students that were excluded from the original lawsuit. The Appellate Court wrote in its opinion, in declining to issue an injunction, and directly oversee the desegregation and integration of the schools, writing, and “a judgment containing such a provision would be uncontrollable and impossible.”⁷⁷

The educational segregation is not codified through laws as it was in the United States, but rather through the decentralized actions of thousands of parents, educators, and municipal leaders, that shape and cajole the separation of students based on perceived ethnic differences. In Hungary, this occurs because there is a constitutional right for parents to choose the school that their children will attend. On first glance this is a seemingly positive development in education choice. If a student is smart, and wants to attend for example a bilingual school, then it is a positive thing that the parents are able to so easily receive a voucher for their child to attend that school. However, there are other more sinister results of this law. There is a differentiation in schools, not all schools are great schools. What happens is that if parents perceive that a school has a high number of Roma students, it will be equivocated with a bad school, the quality of teaching is assumed to go down, and the potential achievement of the students will go down. Therefore the parents chose to send their students to other schools. However, this costs money—in travel and other expense. So what happens here is that the students that cannot afford these additional expenses, or are simply not accepted by the headmaster of the better school, due to a myriad of reasons, they are stuck in the worse-off school. So what you have are two groups of students. In the first group are the students who are told they are smart and hard working and ‘made it’ to the better, more challenging school. In the second group, you have those that are left behind in the worse off school. As students leave, funding goes down, which leads to worsening situation

⁷⁷ Chance for Children Found. v. Local Council of Miskolc, Pf.I.20.683/2005/7 (Debrecen App. Ct. 2005), available at http://www.cfcf.hu/miskolc1_en.html

overall, for funds available, and for teacher motivation and diversity of the classroom. One cannot overestimate the importance of quality teachers who are provided with sufficient resources to shape the education of the students. This type of self-segregation cuts down class lines as well. There are situations where you have the middle class students traveling to certain schools, lower class students in worse off schools, and then the very bottom of the class structure funneled into vocational schools. “Concentrating disadvantaged children in one school or classroom may lead to an unfavorable subculture towards learning. The leaders of the peer group can label students who perform and have good contact with the teachers as nerds, and they can create their own resistant culture, one that opposes everything that comes from the school.”⁷⁸ Schooling is and important if not the most important predictor of what one will achieve in ones life. Students that are funneled into vocational schools are all but guaranteed to stay at the bottom, as day laborers or other menial labor, whereas the students from the more elite institutions will naturally fill the roles at the top. “School segregation of children with lower social status and learning disadvantages has increased dramatically in Hungary. The school segregation of Roma children is only a part of this broader problem, although a very important part.”⁷⁹

The case in Miskolc, which was considered groundbreaking, in that the courts acknowledged that segregation in education was leading to the discrimination based on ethnicity and was an offense against the discriminated students. The CFCF believes that the only way to provide quality education is to force the closure of the Roma only schools and transfer these students to more elite schools. However, an additional problem that arises in Hungary is the existence of intra-building spatial segregation. This is a situation that is in many ways similar to that faced by some African-Americans.

⁷⁸ Kertesi and Kézdi (2005) 16

⁷⁹ Kertesi and Kézdi (2005) 1

In the United States, one solution to increase integration was the creation of magnet school located in predominantly lower social strata, high minority areas. An example of this type of institution is Bronx Science, which is considered to be one of the top public schools in New York State, and is very competitive to gain admission to. However, although I do not suggest this is a specific problem with Bronx Science but with magnet schools in general, is that it draws majority students from different areas to the school, but ironically, does not provide for the local neighborhood. Another outcome is that the magnet school will be cut in half, as occurred in a fine arts magnet high school in San Francisco. In this case, the bottom half of the school was designated as the magnet school and was attended mainly by Caucasian students, the top floor was a local neighborhood school and was practically exclusively minority—black or Latino students. A similar situation occurs in Hungary. Again, this goes back to the free school choice, and each child’s right to attend any school, as long as they are accepted by the admissions, based on spots available and entrance exams. On the one hand schools want to highest achieving students, and also want tom maintain high levels of funding from the state, which is based in part on number of students. In order to entice non-Roma parents to enroll their children, schools will opt for separate classrooms for Roma children. What this results in is another situation where there is seemingly integrated schools, but spatially segregated within the school building.

In Hungary, segregation in schools is a result of spontaneous actions on the part of thousands of different actors. Different groups including parents, educators, municipal leaders, and the state government interact and pursue a series of actions, which result in the segregation of education. The stage is set, so to speak, by the free school choice that was adopted in Hungary shortly after the transition from communism. Gábor Kertesi and Gábor Kézdi argue that as schools become more segregated, minority students are more likely to receive an inferior education. Additionally, they argue that the result of this inferior

education, both in content and in length of study, contributes in large part to the continued reliance on state support for survival, which leads to a situation where barely educated individuals are not capable of contributing to the state because they do not have skills useful on the job market, and thus represent a net loss of potential tax revenue. Additionally, the continued practice of creating a permanent underclass has the effect of hampering the state's economy and is particularly alarming since Hungary has a shrinking population, leading to issues of loss of revenue to support social services for elderly, healthcare, and child services. The economic potential in education individuals is present in Hungary, Czech Republic and in the United States. The potential for the Southern part of the United States to be an economic powerhouse instead of a major region of poverty was in part contingent on quality education, something which was, and in many places denied to minorities, and other impoverished individuals.

On the printed page, Hungary is second to none in opposing segregation and promoting integration. It has encouraged desegregation through ministerial guidance and special budgetary allocations...no school district had accepted desegregation funding that year because of a fear of white flight. According to Lilla Farkas, the principal litigator against school segregation in Hungary, local governments do not take advantage of central budgetary funding for desegregation, at least not at the primary school level.⁸⁰

The high levels of decentralization and a lack of enforcement (i.e. reliance on goodwill) have contributed to a lack of progress in real integration. However, Greenberg points to another possible reason why this is occurring:

[A]nother factor is the increase in stratification of society. After communism, where everyone was more or less middle class, stratification showed up in schooling. It is much more present in Hungary than in Bulgaria. What needs to happen here is that grassroots movements need to be more active, and Roma parents need to be more concerned and motivated and encourage their children to go to school and do their homework. There needs to be all three parts: the Roma children, the Roma parents, and the schools, all working together...⁸¹

⁸⁰ Greenberg (2010) 963

⁸¹ *ibid*963

However, this solution does not acknowledge the broader picture. The problem is not necessarily that Roma parents do not encourage their children to do their homework or go to school. The wrongful placement of Roma children in very high numbers into schools designed for children with slight to severe mental disabilities is reason for greater concern.⁸²

In the Hungarian education system, there is a strong desire on the part of many relevant groups, including parents, administrators et cetera to maintain the status quo. In the highly decentralized system⁸³, where changes need to be enacted on a case-by-case basis (for all intents and purposes), this system as it is presently designed is ripe for the preservation of the status quo. In the face of desegregation, and the perception that the quality of education will decrease with the increase of minority students, parents of non-Roma students will transfer their children to different schools that are still considered elite schools.

This is reminiscent of a phase in U.S. school desegregation when southern segregated schools transitioned to “freedom of choice” plans, which, instead of requiring integration, permitted students to attend the school of their choice. The result was substantial segregation brought about by the momentum of prior racial assignments. The U.S. Supreme Court, during a period in which it firmly insisted on desegregation, struck down such arrangements.⁸⁴

In Europe though, either on the national level in Hungary, or on the supranational level, there are no similar provisions that can counteract this trend.

⁸² An additional problem is “Due to a lack of pre-schools in small villages, almost 20 per cent of Roma children live in areas with no pre-school nearby, and the transportation to villages where there is a pre-school may not be provided. Overcrowding is also a problem in areas where there are pre-schools.”(EU-MAP Equal access to quality education for Roma, monitoring report p 248)

⁸³ At the regional (county) and local levels, educational administration is integrated into the general system of public administration. In other words, there is no organizationally separate educational administration. The county and local level of public and educational administration is based on the system of local governments. This means that administration is controlled by politically autonomous, elected bodies, and the central government cannot issue direct orders to the local governments. The authority of the regional level administrations is quite weak, while the scope of responsibilities at the local level is fairly wide. The number of local governments is very high and their average size is small. (EU-MAP Equal access to quality education for Roma, monitoring report)

⁸⁴ Greenberg (2010) 945

Meanwhile, In Miskolc, the Chance for Children Foundation is continuing to battle the authorities to shut down the dilapidated Roma only school and push for fully integrating the schools. Unfortunately, in its decision “the court explained that it could not grant the order requested by CFCF to integrate Roma children into mainstream classes along the relevant provisions and ministerial guidance, as this would amount to the enforcement of measures in public law. The court noted that in lieu of a detailed and school-specific integration plan it could not render any other decision.”⁸⁵ The Use of strategic litigation in Hungary is a valuable tool, but it is unfortunately very costly, inefficient, and without a very broad reach. Although some hope that these cases that result in favorable ruling for the Roma will create rallying points for further demands and efforts for integration. In the following chapter I will discuss what are the various options for what more can be done, and what tools can be taken from the *Brown v. Board* case in the United States, to increase access to quality education for Roma in Hungary, and the Czech Republic.

⁸⁵ EU-MAP Equal access to quality education for Roma, monitoring report p 243

Chapter Five - Tying it all together

When a child is told he is stupid, he is going to stop trying, thinking it's no use because he is stupid—and then he will end up stupid. (Greenberg 989)

The three cases that have been described above, each arising in their own unique environment, and argues in three separate legal systems: the United States Supreme Court, the European Court of Human Rights, and the Hungarian Appeals Court in Debrecen. However, the similarities, both in the nature of case—segregation in education, and the limitations presents in the judgments provides an excellent basis for the comparisons of these cases, and the aftermath of each case in order to find the best policies and means to move forward on the issue of integration of educational facilities, access to quality education for minorities and underprivileged youth and the resulting access to other opportunities in employment and poverty reduction. There is no difference in the potential academic attainment between different groups. What this means is that levels of intelligence, and potential academic success is no different for African Americans than for Caucasian Americans, or Roma or Hungarians or Czechs. However, the out-put is different. African Americans score consistently several hundred points lower on the Standardized Admissions Tests (SATs), which is widely used for university admissions. In Hungary, approximately .2 percent of Roma attend post-secondary education. The point is, if it is not a biological reason behind this disparity (and my argument is that clearly, in terms of biology, everyone has equal potential) then it is something else that is happening that is causing this. These three court cases look at how discrimination in education specifically has had a negative effect on the educational out come of the minority students. My argument, and the argument presented in each of these cases is that each individual has the right to access quality education and to be free from an environment that exudes bias and racism. This racism, which in each of these cases is highly pervasive throughout society leads to a decreased potential for academic

opportunities. Additionally, there has been a lot of research done in both the US and in Europe about the performance of students in mixed classrooms. Kertesi and Kézdi, in their article about segregation in primary schools point to this fact, that in mixed classrooms there is a higher out-put in terms of scoring on tests and level attained. My hypothesis is that in a classroom, with well-qualified teachers, where there are higher expectations, and high levels of support, students, regardless of background will succeed. Below I will discuss the case of the Gandhi School in Pécs, which is arguable a successful example of exactly this idea.

In each of the court decisions rendered, on the one hand, the decisions have sent a strong signal that the status quo, of discrimination, unequal access to education and cheating children out of their future are no longer acceptable. In *Brown*, the Court struck down the legal concept of separate but equal, by stating that separate is never equal. In central Europe both cases found that where policies had the effect of indirectly discriminating, even when facially neutral, in other words, when the policies result in unequal opportunity, this is illegal and must be changed. However, in each case, the Court faltered in the implementation of desegregation. In the United States, the phrase “with all deliberate speed” from the *Brown II* decision had the effect of basically discounting all of the moral force and clarity of the verdict in *Brown I*. Orfield and Eaton argue “If we consider *Brown* as a ruling designed to eliminate school segregation, we know that, for the most part, it has been a failure...after the ruling Southern school segregation continued almost undisturbed well into the 1960s. Northern schools remained segregated until the mid- 1970s. Segregation actually grew in the 1990s.”⁸⁶

In the case of *D.H. and Others* the court declined to lay out clear strategies for the implementation of real desegregation, noting instead that the change in name from special remedial school to practical school as a step in a positive direction. The main point in including *Brown* in the discussion on desegregating education in Hungary and Czech

⁸⁶ Ladson-Billings (2004) 6

Republic is because after approximately 55 years, there is a significant enough experience to see what was successful and where the decision faltered. We can then use this in looking at the cases in Europe as a guide for where to go forwards in increasing integration and access to education. Legal scholar Charles Lawrence asserts that the flaw in *Brown* comes as a result of the Court's fostering of "a way of thinking about segregation that has allowed both the judiciary and society at large to deny the reality of race in America...Lawrence points out that Black children suffered injury not because they were sitting in classrooms with other Black children, but rather because they were in those classrooms within a larger system that defined them and their schools as inferior."⁸⁷

Perhaps one of the most telling examples of the effect of *Brown* is the reaction amongst white Americans, particularly in the South. "We knew there would be resistance, but we were unprepared for the depth of the hatred and violence aimed at Black people in the South."⁸⁸ After the decision in *Brown II* nothing of significance in terms of desegregation happened for some time. However, once schools started to desegregate, (white) parents started sending their children to private, or parochial schools, many times with financial assistance from local municipalities. This was only stopped once the courts and the federal government stepped in and deemed this illegal. It is clear that in many cases people cannot have unlimited freedom in choosing their child's school. There needs to be a balance created between the individual right of the child to choose a quality education, and the responsibility to not segregate. It is clear that in both the US and with the Roma minority in Czech Republic and Hungary, the Roma parents and the ethnic majority parents do not have an equal right in choosing the education of their children. In other words, some people are freer to choose than others.

⁸⁷ *ibid* 5

⁸⁸ *ibid* 5

In both the United States and In Czech Republic and Hungary, there is a tension between local control over education and the state/federal control over education. Kézdi and Kertesi, as well as Ladson-Billings amongst others, argue that power over education needs to be drained from the local level, and centralized at a higher level, that is more removed from local prejudice. They argue that at a higher level, policies with broad implications can be enacted with powerful consequences. In looking at desegregation in United States, the South was ironically, the region that became the most integrated. In the European Union, under the Racial Equality Directive (RED) can play an important role in removing the option of continuing segregation. Clearly, states that fall under the jurisdiction of the RED should be help accountable.

Merging of two or more schools into one administrative unit has resulted in several countries in perpetuating segregated education of Romani children who remain physically separated (in a separate school building) although they formally attend the same school. School merging has allowed school maintainers in some instances to avoid desegregation measures claiming that the school has an ethnically diverse student body. In other situations, school merging has lead to a considerable increase of the Romani student body within a single school building which fact in turn triggered the withdrawal of non-Romani students and the segregation of the school, respectively.⁸⁹

One of things that need to be dealt with carefully is the subversive continuation of segregation under the guise of integration.

It is true that in many ways a direction comparison between black Americans and Roma is not tenable. Some argue that the rampant prejudice and discrimination facing the Roma in Europe is more similar to the American Indians than to blacks. One of the major points of success for increasing rights and access to education in America was the existence of a strong civil society advocating for these rights. Additionally, African-Americans were well organized in churches and communities, and although blacks in America faces pervasive

⁸⁹ ERRC. “Impact of legislation and Policies on School Segregation of Romani Children” Budapest. (2007) 57

poverty, they did not experience the levels of unemployment faced in some remote villages in Hungary where unemployment figures are about 90 percent. However, this does not necessarily need to be like this. There is an opportunity for Roma civil society groups to rally around these court cases, since they are success stories on one level. The point is that court decisions alone will not create the change necessary to alleviate discrimination in education. There also needs to be strong federal or EU-level regulations with strong incentives, and corresponding sanctions for noncompliance. Strategic litigation and *actio popularis* are very valuable, but in the current system the onus is on cash-strapped and relatively small private NGOs, the process is incredibly laborious and slow. Although *Brown* has become something of a rallying point for desegregation, it was only when it was coupled with strong federal regulations in the Civil Rights Act and Voting Rights Act of the 1960s that results were beginning to show.

The leading role of the European Union in the process of setting the general legal framework for the adoption of legally binding obligations to desegregate education by the Member States is crucial. Possible solutions, involving legislative action on the basis of Article 13 EC, 82 have been justified by the EU Network of Independent Experts on Fundamental Rights.⁸³ This expert body proposed to the European Union to consider adopting a directive based on Article 13 EC and specifically aimed at improving the situation of the Roma/Gypsies population. The Directive “should take into account the need to effectuate the desegregation of the Roma/Gypsy communities, where this is required, especially in employment, housing and education.”⁹⁰

As this quote states, the European Union can play a vital role in implementing desegregation.

Additionally, one thing that will help bring parity in education is universal access to pre-school education. “There is a consensus among educational experts...that access to pre-school education for Roma children is a major precondition for higher educational achievement, prevention of placement in special schools for the mentally disadvantaged, and prevention of early drop-out from school.”⁹¹

⁹⁰ *ibid* 59

⁹¹ *ibid* 51

Kertesi and Kézdi⁹² make several suggestions for ways in which education in Hungary can successfully open to Roma. These suggestions include increased funding, and monitoring for schools that fully integrate. This does not mean technical integration but in reality intra-school segregation. There needs to be regulation of school admissions to minimize white flight. Additionally, the introduction of mandatory quotas is one possibility. The introduction of affirmative action, as described above, although not always readily accepted has the potential to force schools to increase the educational opportunities for children. In Hungary and in the Czech Republic the focus is on just getting children through a certain level, or number of years of schooling. The focus is not on quality education. Children need to be removed from special schools and even inefficient vocational schools and allowed to study and compete in normal high quality schools. What is clear is that:

The impact of Government policies to reduce the numbers of children educated in separate special education facilities on the desegregation of Romani children in these schools is still not visible. In the meantime, a number of factors, which had so far influenced the erroneous placement of Romani children in special education, have not been eliminated. Such factors are the culturally biased diagnostic methods for placement in special education, which were proven to produce racially disproportionate results; the lack of systematic re-diagnosing of children in special education; and the lack of effective control mechanisms to detect and sanction misuse of special education provisions leading to segregation of Roma.⁹³

As previously mentioned, one thing that needs to be done in order to force governments to desegregate is the improvement of mass involvement in civil society organizations.

Greenberg argues in his comparison of Roma desegregation efforts with the US that this is probably the most important thing to do. Without widespread demand for change, change will not occur broadly.

In the United States, *Brown* has a mixed record. The clearest lesson learned from *Brown* is that court judgments are only truly great when there is a mechanism for enforcement that are not given with a back door opt out. Local schools used the term “with all

⁹² Kertesi and Kedzi (2005)

⁹³ ERRC (2007) 50

deliberate speed” to their advantage, and to the disadvantage of millions of school children. It is clear that desegregation worked best in the US, where it was required, and strictly enforced. It is also clear, as shown in the previous chapter on *Brown* that once enforcement is relaxed, before integration has really set in, then segregation can start anew. The United States has come a very long way in terms of race relations; however, racism, bias and prejudice are still pervasive. The court cases in Czech Republic and Hungary cannot be allowed to be viewed as solving the problem, because in reality they are only the beginning point. The most worrying thing is that governments and municipalities will look to the judgment, and say, “see the court said this is no longer allowed, and so it does not occur anymore” when in reality segregation is still pervasive. In other words, the court cases cannot be allowed to be turned into a front, for continued segregation. Another pitfall of *Brown* is “There is no provision in *Brown* for equality of out- comes. As long as Blacks and other children of color were given the opportunity to attend the same schools that Whites did, the state had met its legal and civic obligations. Communities of color, desperate to receive a better education, were satisfied with the terms of the decision.”⁹⁴ In Europe, the focus needs to shift from, for example free school choice, where everything hypothetically has equal option to choose any school, to maximizing educational output.

The Gandhi School in Pécs provides an additional option beyond public school integration. Arguable the opportunity afforded to the students at the Gandhi school might be hard to replicate on a bigger scale, and therefore I do not suggest that integration should be abandoned in favor of this model. The Gandhi school is reminiscent of elite schools for African Americans, particularly in the South of the US. Importantly, the Gandhi school took a cadre of Romani students; put them into a strenuous academic environment with very high standards—higher than in normal public schools for majority students. The administration

⁹⁴ Ladson-Billings (2004) 7

and teachers of the school acted with the assumption that these students can perform at exceptionally high levels if the expectation is provided. Of the original 56 students that enrolled the first year, 18 passed the high school leaving exam. Some of the students that did not make it to the end had finished their studies in different schools, or had opted to return home for a variety of reasons. Some argue that 18 out of 56 is not success, but more similar to failure. But when looking at the statistics for number of Roma that successfully complete high school, let alone with a quality education, and the number that successfully entire tertiary education, the Gandhi school can quite legitimately be heralded as a success. “Above all, the school’s success has larger symbolic value: Gandhi School refutes the stereotype that Romani students cannot succeed. Derdák (2004) argues, ‘so it’s not true that 95 per cent of the Gypsy community cannot continue their education. It is the schools that cannot do their job.’”⁹⁵ Of the first class to graduate, eight of the eighteen enrolled in university education. This is a rate of fourteen percent of the original number. Again, when only two tenths of one percent of Roma are able to enroll in tertiary education, fourteen percent is an amazing jump.⁹⁶

According to Katz, of the ten students that did not enroll in university they are all employed, and doing valuable things. This includes law, social work, teaching Romany, military service and customs agent.⁹⁷ The point is that when provided with a quality education environment, students will typically flourish and rise to the expectations of the teachers and administration. If students are placed into schools for the mentally disabled where they are expected to count to number ten and recite the alphabet in grade four, then that is the level that the student will rise to. It has been clearly shown that it is then nearly impossible to bring students back into the normal school system, as it is currently designed.

⁹⁵ S.R. Katz. “Emerging from the cocoon of Romani pride: The first graduates of the Gandhi Secondary School in Hungary.” *Intercultural Education*, Vol. 16, No. 3, (2005) 259

⁹⁶ *ibid* 253

⁹⁷ *ibid* 253

Clearly, the government should be held responsible to provide the support system necessarily to bring the children that are being wrongly held back up to a normal level in order to be able to contribute as productive members of society.

Although the students graduating from the Gandhi school emerged proud of their Romani identity, one student expressed in an interview with Katz that at times she is still is not sure if the prejudice is without basis. In short, this points to the continued internalization of prejudice. Katz argues that this is an example of the pervasive existence of ‘whiteness’, which is expressed as racism in Hungarian society.

There is not only a moral obligation on the part of the government to provide equal quality education for all students, but there are also more practical imperatives. Students that achieve a quality education beyond simply basic counting in primary school will be able to contribute to society. To put it bluntly, those that are denied this are much less likely to be able to contribute to the state coffers. At a time when the ethnic Hungarian population is aging, and birthrates are slopping down, the state will rely on all youth in order to continue the welfare state policies and social security that are currently in place.⁹⁸ The Gandhi school arguably proves that high levels of achievement are possible. However, the point is not necessarily that the school is geared specifically towards Roma. What is important is that the school was geared towards developing a sense of respect and dignity for Roma students to be able to say that they are Roma and equal. Support mechanisms can be put in place in public schools that can achieve similar things. Teachers need to be trained accordingly, but the lessons learned from the Gandhi School can be feasibly implemented in schools throughout the state.

⁹⁸ Kertesi and Kézdi (2006)

Conclusion

This paper started with the premise that quality education is important in reducing poverty, and competing in the globalizing world. Denying access to quality education is denying students one of their basic rights. Relegating students to inferior education in decrepit buildings with low expectation is one of the main culprits in the continuation of poverty, discrimination, and prejudice. In choosing *Brown v. Board, D.H. and Others v. Czech Republic* and *Miskolc Desegregation case* I used three different examples of strategic litigation in the effort to stop segregation in education. In 1954 the United States Supreme Court struck down the legal concept of separate but equal. In the past 56 years there have been great strides made to live up to the promise of this judgment. However, in hindsight, it is clear that it has not always been a success. In choosing to compare the two cases from Europe, dealing with Roma with the case from the US dealing with African-Americans I am asserting that the lessons learned, the pitfalls, failures and successes can be studied in an attempt to successfully desegregate education in the Czech Republic and Hungary.

Strategic litigation, using the courts to effect social change has real value and can produce certain positive results. However, the courts alone are not sufficient in this regard. It is vital to couple the decisions coming out of the court, with strong oversight, international pressure, and strong federal regulations. Arguable, once the Civil Rights Act and the Voting Rights Act were enacted real reform started to take off on the ground level. The court decisions in Czech Republic and Hungary are both huge positive steps forward for Roma demands for access to education however, the implementation of the lofty goals established in these decisions are not coming through as quickly or as widespread as desired. Where strategic litigation has its limits, it is vital for the federal government, or in the case of Hungary and Czech Republic, for the EU to step in and enforce desegregation. I have chosen to examine the cases of segregation and the negative effects it produces in society through the

lens of critical race theory, which puts issues of race and racism squarely in the center of discussions on the workings of society and institutions such as schools. I argue that critical race theory is pertinent to the topic at hand because the failing of Roma children in the current educational system cannot be attributed to any biological factors, but is in fact the result of a system designed to funnel certain groups to the top, and other groups to the bottom.

There is a debate amongst the educational community about the best way to improve education, some point to examples such as the Gandhi school, where separated education is distinctively different from the ghetto segregated schools found in other places for Roma. The Gandhi School is not alone; there are many schools both secondary and tertiary in the United States designed for African-Americans as a means to infuse education with dignity and high levels of achievement. However, as pointed to before, this model is not necessarily exclusive from integrated education. What is wrong with the educational system as it is now is that there are two tracks where one ethnicity and class is funneled into a track where they are provided with support, and quality teaching. In the other track are students that are majority Roma and poor. These students are not expected to learn much of anything. What is lacking is sensitivity to ethnic particularity, and expectations that students can and should be high achieving. Although I think that there are several positive aspects of the Gandhi school, I do not believe that it is tenable for the entire state to create a dual system that does not lead to a differentiation in educational standards. The mold of *Brown* is the way forward, but where *Brown* faltered, in the execution of high principles, the European cases need not. At this point is where the EU can play an effective role in requiring an immediate end to segregation. I argue that the system as it currently is needs to end, but additional positive steps need to be taken. In the case of Czech Republic, while the ECHR was deliberating they passed a new school act, which formally abolished the special schools, bringing all schools under the

banner of regular primary school. However, beyond the name change, nothing else changed. The curriculum was the same, and the students were the same. This is an opportunity that the European Union should not pass by to force member states to live up to the expectations of a 21st century moral society.

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